No. 928. 346.

Brief of White for Petitioner.

Filed Mar. 8, 1894.

Supreme Court, U.S.
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# In the Supreme Court of the United States

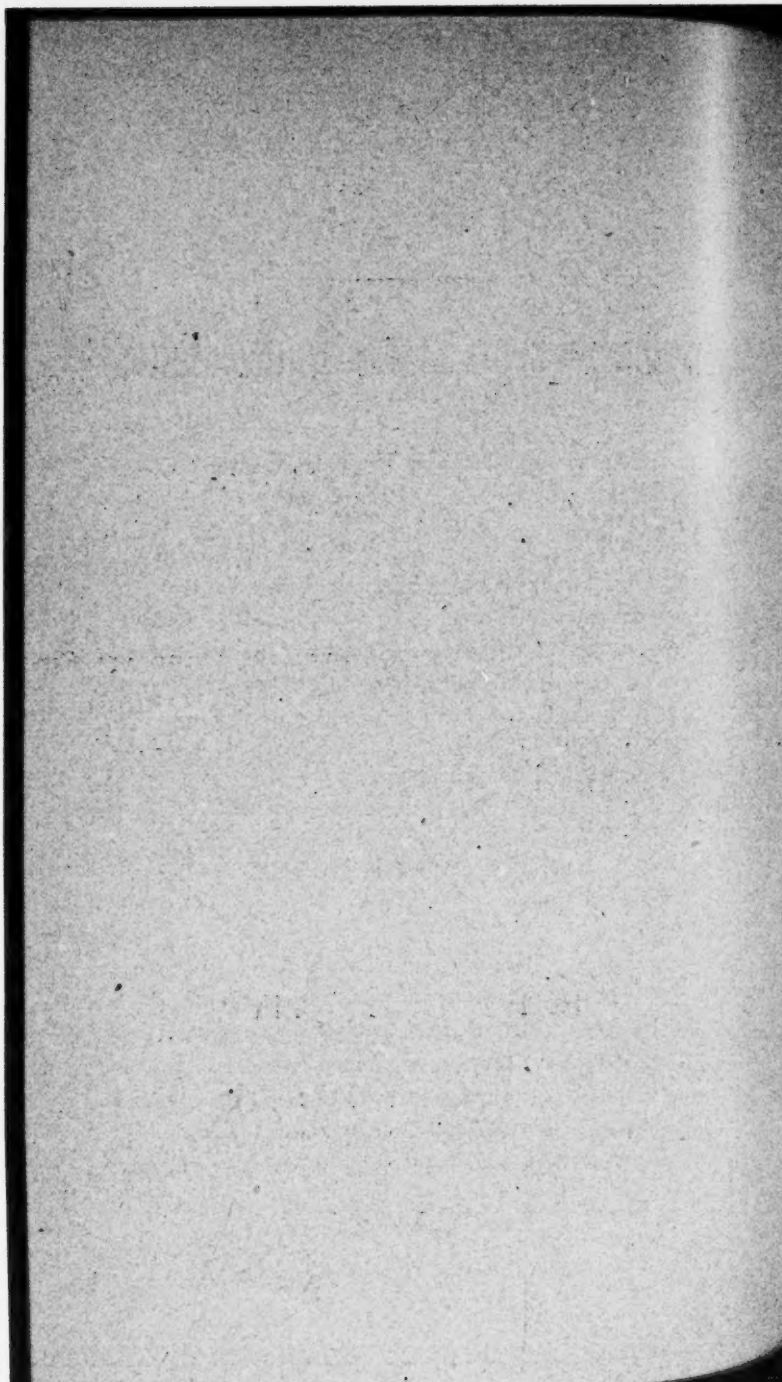
*Ex-parte* MISSOURI, KANSAS & TEXAS TRUST COMPANY,

Petitioner

Petition for Writ of *Certiorari*, requiring the Circuit Court of Appeals for the Eighth Circuit to certify to the Supreme Court, for its review and determination, the case of Missouri, Kansas & Texas Trust Company, Appellant, vs. Theodore M. Krumseig and Louise Krumseig, Appellees.

## BRIEF OF PETITIONER.

WM. C. WHITE,
Attorney for Petitioner



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## BRIEF OF PETITIONER.

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### STATEMENT OF CASE.

In this matter, in order to a proper understanding by this court of the question presented by this petition, it is unnecessary to review the case or to detail the evidence. Suffice it to say that petitioner, a Kansas corporation, loaned to Theodore M. Krumseig, a resident of Duluth.

Minnesota, a sum of money, and as collateral to the loan said Krumseig and his wife executed to petitioner a mortgage on real estate in Duluth.

The Krumseigs brought suit in the State Court in Minnesota, on the equity side of the court, to have the loan declared void for usury, and the promissory note given therefor and the mortgage executed as collateral thereto set aside and cancelled. Petitioner, defendant in that suit, removed the suit into United States Circuit Court for the Fifth Division, District of Minnesota, and that court, after a hearing, entered judgment for plaintiffs, the Krumseigs, for the relief demanded. An appeal was had to the United States Circuit Court of Appeals for the Eighth Circuit, and there judgment of the lower court was affirmed, both courts basing their judgment on a finding of usury.

Among other contentions of petitioner, it was maintained that in a court of equity, "He who seeks equity must do equity," and that as a condition precedent to the granting of relief, it was necessary for the Krumseigs to repay or offer to repay to petitioner the amount justly owed to it for principal and lawful interest.

On the authority of a Minnesota decision that under Minnesota law the rule of equity is abrogated as far as Minnesota contracts are concerned, the Circuit Court of Appeals decided, by a divided vote, that the equity rule referred to could

not be invoked in this case. Judge Sanborn dissented, on the ground that "the equity jurisdiction conferred on the Federal Courts is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the union."

A re-hearing was asked and denied, but in connection with the refusal of the Circuit Court of Appeals to grant a re-hearing, the following letter, the original of which is annexed to a copy of this Brief and presented herewith, was received by counsel for petitioner:

"St. Louis, Missouri, Dec. 14, 1896.

"William C. White, Esq.,

"Duluth, Minn.

"Dear Sir:—

"The court denied your application for "a re-hearing in the Missouri, Kansas & Texas "Trust Co. vs. Krumseig, this morning. With "the approval of my associates upon the bench, "I make the suggestion to you that the question "upon which the members of the court "disagree, is one which ought to be answer-"ed by the Supreme Court of the United States. "It is an important question, one which involves "the jurisdiction of the Circuit Courts in many "equity cases, and we think it very probable that "if you presented this case to the Supreme "Court and asked for a writ of certiorari, that

"court would grant it, and would review the "case.

"Respectfully yours,

"WALTER H. SANBORN."

It is in accordance with the foregoing suggestion, coming from the court itself to whom the writ would be addressed, that your petitioner brings this matter here.

This court is very familiar with the provision of Section six of the Judiciary Act of March 3, 1891, establishing Circuit Courts of Appeals, that in the cases in which the judgments and decrees of the Circuit Courts of Appeals are made final (of which this case is one), "it shall be competent for the Supreme Court to require, by *certiorari*, or otherwise, any such case to be certified to the Supreme Court for its revision and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

26 Stat., 826, C. 517.

This section of the Judiciary Act has been before this court a number of times, and I am aware that in a case argued before this court in March, 1893, where the assistance of this writ was invoked, this court expressed the opinion that the authority conferred upon it by that provision of the section "should be exercised sparingly and with great caution, and only in cases of

peculiar gravity and general importance, or in order to secure uniformity of decision;" and that out of many applications for this writ under this section, two only had up to that time been granted.

American Construction Co. vs. Jacksonville Railway. 148 U. S., 372, 383.

I suspect also that counsel for the Krumseigs, appellees below, will cite the case of Woods, petitioner, where the question was whether the Circuit Court of Appeals should follow the construction by the Supreme Court of Minnesota, of a statute of that State; as similar to the present case and conclusion herein.

But this court refused the writ in that case on the ground that the inquiry therein did not fall "within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them." And in another part of the opinion, referring to this section, says: "But in the interest of jurisprudence and uniformity of decision, to use the language of the eminent jurist and statesman who had charge of the bill, provision was made under section six for such supervision on our part as would tend to avert diversity of judgments and guard against inadvertence of conclusion in controversies involving weighty and serious matters."

In re Woods, 143 U. S., 202, 206.

It is "*in the interest of jurisprudence and uniformity of decision*" that we ask for the writ in this case. If the decision of the Circuit Court of Appeals is permitted to stand it will introduce into our jurisprudence a discordant element that is sure to be followed by much vexatious litigation, which would be avoided by the settling once and for all by this court of the application of the rule of equity in all cases of this nature.

It is believed that the highest court of every state of the United States which has a usury law with the exception of New York and Minnesota, has followed this rule; so that Tyler in his work on Usury, says: "The invariable rule in equity is, that a bill or other proceeding in equity to set aside or affect a usurious contract, whether filed for relief or discovery, or for both, cannot be maintained without paying or offering to pay the amount actually loaned."

Tyler on Usury, 435.

The following are a few of the cases in our state courts in which the rule that "he who seeks equity must do equity" has been followed; only one of the leading cases in any state being cited.

Rogers vs. Torbut, 58 Ala., 523, 525.

Ruddell vs. Ambler, 18 Ark., 369. (Under State law.)

Pickett vs Merchants Nat. Bank, 32 Ark., 346, 364. (Under U. S. law.)

Campbell & Jones vs. Murray, 62 Ga., 86, 96.

Cushman vs. Sutphen, 45 Ill., 322.

Connor vs. Myers, 7 Blackf. (Ind.) 337.
Morrison vs. Miller, 46 Iowa, 84, 86.
Jordan vs. Trumbo, 6 Gill & Johns. (Md.) 103, 106.
Eiseman vs. Gallagher, 24 Neb., 79, 82.
Giveans vs. McMurtry, 16 N. J. Eq., 468, 473.
Ballinger vs. Edwards, 4 Ired. Eq. (N. C.) 449, 452.
Shelton vs. Gill, 11 Ohio, 417.
Sporrer vs. Eifler, 1 Heisk. (Tenn.) 633, 636.
McDaniels vs. Barnum, 5 Verm. R. 279, 292.
Rietz vs. Foeste, 30 Wis. 693, 695.

The rule of equity has also been followed by the United States Supreme Court and the various Federal Courts, until the decision in this case.

Tiffany vs. Boatman's Institution, 18 Wall., 375, 385.
In re Hoole, 3 Fed. Rep., 496, 500.
Matthews vs. Warner, 6 Ib., 461, 465-6.
Nounan vs. Peper, 24 Ib., 403, 404.

It is hardly proper at this time and upon this application, to discuss the merits of the decision of the Court of Appeals in this case, or of the decision of the Supreme Court of Minnesota which it follows; such a discussion will be in place upon a later review of the case if the writ prayed for herein is allowed. At present it is sought only to demonstrate that the granting of the petition is in the interest of "uniformity of decision" in the Federal Courts. Yet in this connection it seems incumbent upon me to merely outline the reason for the apparent variance between the decisions of the New York Courts and of all other

courts but Minnesota. And in so doing, I think it will become apparent that the variance is *only* apparent, and that the decisions are in reality uniform, excepting only in the case of Minnesota, and there without reason.

The cases cited *supra* are from states and under laws where certain penalties are exacted for usury not only, but also from others where the entire contract is declared void for usury, as in Minnesota. Revert now to the New York decisions.

Under the laws of New York state as existing prior to the enactment of Chap. 430, Sec. 4, Laws of 1837, the decisions uniformly upheld the rule for which we contend. The leading case prior to that law was the case of Fanning vs. Dunham. The law of New York at that time voided the contract as does the Minnesota law, and there the court held, that when the borrower sets up usury as a defense to an action on the usurious contract the securities will be declared void and ordered to be delivered up and cancelled; but where the borrower files a bill in equity for relief, he must before he is entitled to relief, pay or offer to pay the principal and interest lawfully due.

Fanning vs. Dunham, 5 Johns. Ch., 122, 142-4.

The decision was followed in all the courts of that state until the enactment of the law of 1837, when a new departure was taken, and it was de-

cided that the borrower might come into a court of equity thereafter and seek relief from an nsurious contract, without offering to make any re-payment whatsoever.

Livingston vs. Harris, 11 Wend., 329.
Williams vs. Fitzhugh, 37 N. Y., 444, 448—456.

We need not look far to discover the reason for this change of base in the state of New York, or to discover that the reason exists alone in that state. The court in the case of Williams vs. Fitzhugh, *supra*, discusses the reason fully, and I quote from the opinion of the court on pages 452, 3 and 4.

After stating on page 452 that "it is familiar doctrine in courts of equity that 'he who seeks equity must do equity,' and without that the court of equity will not extend its arm for the relief of the suitor;" and on page 453 that "it cannot be doubted that when a party comes into a court of equity to remove a cloud upon the title to his land, he must do whatever is equitable that he should do before the court will interfere;" the court asks, "On what ground is the plaintiff in this case entitled to have his mortgage set aside without qualification or condition? * * Why should he not do equity? Why should he not pay to the defendants what he in fact received?"

On page 454 these questions are answered in

these words: "*The answer and the only answer* which is or can be suggested, is that our statute declares (Laws of 1887, Chap. 430, § 4), that whenever any borrower of money, goods or things in action, shall file a bill in chancery for relief or discovery, or both, against any violation of the provisions of the title of the statutes, concerning the interest of money, or of this act, it shall not be necessary for him to pay, or offer to pay, any interest or *principal* on the *sum or thing loaned*, nor shall any court of chancery require or compel the payment or deposit of *the principal sum or interest*, or any portion thereof, as a condition of granting relief, or compelling or discovering to the borrower, in any case, *usurious loans* forbidden by the said title or this act."

Williams vs. Fitzhugh, *supra*.

Mark the emphatic language of the court, that "*the answer and the only answer* possible, to the question why the equity rule is not applied in that case is, that the statute then in force had expressly provided that it *must not be applied*. Therefore in commenting on the New York change of front, the Supreme Court of Nebraska said that in Nebraska "cases decided under that statute are not applicable."

Eiseman vs. Gallagher, 79, 82.

And the Supreme Court of Wisconsin, where the statutes at the time existing provided that in an action for discovery on a usurious loan, it

should not be necessary to pay or offer to pay interest, nor should the court require the payment or deposit of the principal sum as a condition of granting relief; decided that as the legislature had not extended this provision to cover bills filed for *relief* as well as *discovery*, the New York decisions had no applicability in cases where relief against the usurious contract merely was sought, and applied the rule that "he who seeks equity must do equity."

Rietz vs. Foeste, 30 Wis., 693, 696.

The United States Circuit Court for the District of Massachusetts, went still further, in a case involving this very usury law of the state of New York, and commented upon that law and its application in courts of equity of other states and of the United States as follows: "One who seeks relief in equity on this ground [that an usurious contract is void] must first offer to repay the money actually lent. As a general proposition this is admitted; but there is a statute in New York which authorizes the borrower to obtain such a surrender, in equity, without payment. * * * * * The statute of New York, which authorizes a borrower to obtain a cancellation of securities without payment, cannot bind a court of equity out of the state, and does not undertake to do so. When a borrower comes into equity in Massachusetts, or in the circuit court, he must do equity, as understood by the court in which he sues. If then, the defendants held the

notes for which the bond and mortgage are said to have been given, and if they were so given, there could be no redemption without payment.

Matthews vs. Warner, 6 Fed. Rep. 461, 465-6.

It will thus be seen that the position of the courts is consistent; that in New York state itself the only reason for denying the application of the rule of equity is the express abrogation of that rule, in chancery or equity cases; and that even then, it is denied application in the Federal Courts. Now has Minnesota any similar statute to justify it? We look in vain for any such enactment of its legislature or anything at all similar and must find on investigation that Minnesota's Supreme Court presents the only exception in the list of courts which have affirmed this rule of equity, and that that court has refused so to do under a mistaken conception of the scope of its statutes.

Without stating fully the existing usury law of Minnesota (Chap. 66, Laws 1879), it is sufficient to say that Section 1 provides for an interest rate not to exceed ten per cent; Section 2 provides that where more than lawful interest has been paid "the full amount of interest or premium so paid, with costs," may be recovered in an action brought within two years, one-half to be paid to the use of the common schools. Section 3 provides that all usurious contracts shall be void, etc.; Section 4 provides for the filing by a

borrower of a complaint for discovery of any sum, etc., paid in violation of the usury law, and compels answer thereto under oath; Section 5 relates to evidence in usury cases; Section 6 reads, "Whenever it satisfactorily appears to a court that any bond, bill, note, assurance, pledge, conveyance, contract, security or evidence of debt, has been taken or received in violation of the provisions of this act, the court shall declare the same to be void. and enjoin any proceeding thereon, and shall order the same to be cancelled and given up;" Section 7 repeals inconsistent laws and especially Section 1, Chap. 15, Laws of 1879.

General Laws, 1879, Chap. 66.

This covers our usury law as now existing and as existing ever since the contract under consideration was made. The only provision that could be construed or misconstrued as doing away with the equity rule is the above stated section 6; and an inspection thereof shows at a glance that it is only in case of a proceeding on usurious contract to enforce the same, that the courts will enjoin the lender; it does not *attempt* to provide that a court of equity shall not administer equity, if a remedy is sought by the borrower, on that side of the court. It does render the contract void, but that is true in the other states from which we have cited,—Arkansas, Tennessee, Vermont, etc., and see 18 Wall., 375, 385.

That the equity rule is not sought to be abro-

gated by the 1879 law of usury is shown by another fact. The 1879 law is in all essential features the same as the law of 1877, excepting that it reduced the legal rate from 12 per cent as in 1877, to 10 per cent. Section 6 of the Law of 1877 is identical with Section 6 of the Law of 1879.

General Laws 1877, Chap. 15.

Yet with this same law on the statute books of the State of Minnesota, the Legislature of that state in the year 1878 enacted a law, one section of which (Laws of 1878, Chap. 53, Section 24,) reads as follows: "That the mortgagor, his heirs or assigns, at any time within one year after foreclosure, may recover from the owner of the mortgage at the time of foreclosure three times the amount of any costs or disbursements not absolutely paid for said foreclosure, and three times the amount of any bonuses or interest over and above twelve per cent embraced in said foreclosure, and for which the property was sold, unless said overplus has been paid to the mortgagor or to his assigns." This law remains on the statute books today, unaltered.

Laws 1878, Chap. 53, Sec. 24.

Why enact this section of chapter 53, laws of 1878, if the Supreme Court of Minnesota was correct in its interpretation of the usury laws, in the case of Scott vs. Austin (36 Minn., 460, 465)? If a court of equity would interfere, to give the

borrower a cancellation of his securities because of the contract being void, it would equally have the right to set aside the sale under foreclosure of those securities and cancel them, in an action therefor, and there was no necessity of extending to the mortgagor a less potent remedy than that already his,—a penalty covering triple interest, where he had the right to both interest and principal.

But it will be contended that the Federal courts are in any event bound by the construction put upon a state statute by its highest court. We do not contend that an equity rule may not be abrogated by a legislature, as well as a rule of common law, but we do contend that it has not been in this instance; if then the state court declares that to have been done which in fact has not been, as shown by a perusal of the statute, it is certainly true that a Federal court will not be bound by its decision.

But further than this, it has been universally held by this court that "the jurisdiction in equity is confided to the circuit courts, to be exercised uniformly through the United States, and does not receive any modification from the legislation of the states, or the practice of their courts having similar powers."

Green's Adm'x vs. Creighton, 23 How., 90, 105.

Clark vs. Bever, 139 U. S., 96, 103.

United States vs. Howland, 4 Wheat, 108, 115.

Robinson vs. Campbell, 3 Wheat., 211, 222.
Payne vs. Hooke, 7 Wall., 425, 430.
Kirby vs. Lake Shore Railroad, 120 U. S., 130, 137.
Arrowsmith vs. Gleason, 129 U. S., 86, 98, 99.

In Payne vs. Hooke, *supra*, the court said, "The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation or restraint by state legislation, and is uniform throughout the different states of the Union."

In Kirby vs. Lake Shore Railroad, *supra*, the court said, "Their jurisdiction in equity [that of the Federal Courts] cannot be impaired by the local statutes of the different states in which they sit;" and it adopted the language of Mr. Justice Curtis, "The equity practice of the courts of the United States is the same every where in the United States, and they administer the same system of equity rules and equity jurisdiction throughout the whole of the United States without regard to state laws."

In Arrowsmith vs. Gleason, *supra*, the court said, "We have repeatedly held 'that the jurisdiction of the courts of the United States, over controversies between citizens of different states, cannot be impaired by the laws of the states which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.' If legal remedies are sometimes

modified to suit the changes in the laws of the states and the practice of their courts, it is not so with equitable," repeating the dictum of the court in the case of Payne vs. Hooke, *supra*. And in United States vs. White, 17 Fed. Rep., 561, 565, the Circuit Court for the District of California declared that "It is a universal rule in equity never to enforce either a penalty or forfeiture."

Under such holdings of the United States Supreme Court, it seems to me that the Circuit Court was right in its ruling in Matthews vs. Warner, *supra*, and that whatever may be the practice or the statute in Minnesota, and whatever its construction by the courts of that state, the statute cannot bind a court of equity outside of the state, or a Circuit Court of the United States sitting in equity in a controversy between citizens of Missouri and Minnesota. It seems to me further, that in the interest of that uniformity of decision, which is broken only in this one instance as shown by an examination of the cases, but which is in danger of being entirely destroyed if the decision of the Circuit Court of Appeals shall be allowed to stand in this case, without review; the writ should be allowed as prayed.

Dated February 15th, 1897.

Respectfully submitted,

WM. C. WHITE,
Attorney for Petitioner.